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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

LEASE LIGHTS, INC., JACK R. SEAY, d/b/a SEAY ELECTRIC COMPANY, KNIGHT LIGHTS COMPANY, INC., and PROTECTIVE LIGHTING, INC.,
Petitioners,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Alliance for Fair Competition ("Alliance") respectfully moves for leave to file the attached brief *amicus curiae*. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

As explained more fully in the attached brief *amicus curiae*, the interest of the Alliance arises primarily from two facts. First, its members are threatened by the increasingly anticompetitive conduct of public utilities moving beyond their publicly regulated activities to private, commercial business ventures, some of which have been endorsed by the Tenth Circuit in the instant case. Second, the Eastern Oklahoma Chapter of the National Electrical Contractors Association, Inc., a founding mem-

ber of the Alliance, was a party in *Public Serv. Co. of Okla. v. Oklahoma Corp. Comm'n*, 688 P.2d 1274 (Okla. 1983), a case involving the same parties here in which the Supreme Court of Oklahoma held that outdoor lighting was not a part of the electric utility business and that it was a separate business beyond the jurisdiction of the Oklahoma Corporation Commission to regulate.

In the instant case, the Court of Appeals, relying on a strained and overreaching interpretation of the constitution of the State of Oklahoma, erroneously extended blanket antitrust immunity to the Public Service Company of Oklahoma's ("PSO") purely voluntary participation in the private, commercial leased outdoor lighting business. Moreover, ignoring PSO's anticompetitive conduct and the manifest absence of a clear intent by the State of Oklahoma to supplant competition with regulation in the leased outdoor lighting market, the Court of Appeals found that "there should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized." *Lease Lights, Inc. v. Public Serv. Co. of Okla.*, 849 F.2d 1330, 1334 (10th Cir. 1988).

Since it is likely that respondent will pursue the same line of argument in this Court, it is believed that the brief which *amicus curiae* is requesting permission to file will contain a more complete argument on those issues.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST AND CONCERN OF THE AMICUS

Amicus curiae The Alliance for Fair Competition ("Alliance") hereby submits this brief in support of the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit. The Alliance is an umbrella organization comprised primarily of national trade associations. Its members include:

Air Conditioning Contractors of America
American Supply Association
Carolinas Electrical Contractors Association
Eastern Illinois Chapter, NECA
Michigan Chapter, ACCA
National Association of Plumbing, Heating & Cooling Contractors
National Association of Wholesalers-Distributors
National Electrical Contractors Association
Petroleum Marketers Association of America
Sheet Metal Contractors of Iowa, Inc.
Sheet Metal & Air Conditioning Contractors National Association
SMACNA Metropolitan Detroit Chapter

The Alliance and its members have made themselves available to work cooperatively with small businesses and other interested parties in an effort to eliminate unfair and anticompetitive practices by public utility companies.[1] A significant proportion of the membership of the associations comprising the Alliance are small, independent businesses.

In recent years, utilities throughout the United States have entered into a host of different businesses outside their publicly regulated activities as producers and distributors of gas and electricity. For example, utilities now sell appliances, plumbing, heating and cooling equipment, storm doors and windows, offer service contracts, make home improvements, market and service solar and other conservation devices, perform energy audits and provide a variety of other products and services. These products and services have traditionally been provided primarily by small businesses, many of which are members of the trade associations comprising the Alliance.

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[1] In July 1988, the Alliance published and began distributing to its members and the public a fifty-page handbook entitled "Confronting Unfair Utility Competition: A Blueprint for Action at the State Level."

Small, independent companies are simply unable to compete against their larger, better-financed utility competitors, particularly if some or all of the utilities' costs are cross-subsidized by the ratepayers. The basic advantages enjoyed by utilities as protected monopolies enable them to offer reduced prices for services and products by using their regulated rate-base (funded by individual ratepayers) to subsidize unregulated activities. Cross-subsidization occurs when direct or joint costs of the unregulated activity are misallocated to a utility's regulated business. *See Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 549-555 (1980) (Blackmun, J., dissenting).

Due to the protected monopoly status of public utilities, few small businesses can match the enormous, competitive advantages which utilities bring to any private, commercial business venture. The United States Small Business Administration, in two separate studies, has detailed the impact of new utility business ventures on competition in the private sector, the elements of utility subsidization of these unregulated activities, and the subtle, but powerful, advantages that public utilities enjoy over their small business competitors.[2]

The Alliance and its members are vitally interested in the Tenth Circuit's immunization of the Public Service Company of Oklahoma from antitrust liability for its purely voluntary, private business activities. The Alliance is also deeply concerned about the uniform and orderly application of the antitrust laws to discriminatory and anticompetitive conduct by public utilities, and urges reversal of the Tenth Circuit's decision.

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[2] "Utility Competition with Small Business: Recommendations for States on Utility Energy-Related Programs in the Commercial and Apartment Conservation Service Program" (1984); and "Final Report: Utility Competition with Small Business" (1986).

SUMMARY OF THE ARGUMENT

The Alliance for Fair Competition supports and endorses the arguments set forth in the Petition for Certiorari, and submits this brief *amicus curiae* to enhance and supplement those arguments.

The opinion and judgment of the Tenth Circuit expand the scope of state-action antitrust immunity. The Court of Appeals' holding subordinates the significant federal interest in vigorous private antitrust enforcement to a public utility's interest in engaging in a private, non-utility related business. The Tenth Circuit has allowed a private entity to shield its anticompetitive conduct by invoking the affirmative defense of state-action immunity, where that immunity is based upon the illegal actions of a state public service commission. According to the Tenth Circuit, a defense should be recognized extending state-action immunity to the private, commercial activities of public utility companies where they reasonably rely upon state action, even if that action is not authorized by state law. Despite this Court's frequent pronouncements on state-action immunity, such a defense has never been recognized.

For all of these reasons, elaborated upon in this brief, this Court should grant the Writ of Certiorari, reverse the Tenth Circuit and reinstate the judgment of the district court.

ARGUMENT

State-Action Immunity Is Not An Affirmative Defense To Antitrust Liability, Where A Public Utility Seeks To Protect Its Anticompetitive Conduct Through Reliance Upon The Unauthorized And Illegal Action Of A State Agency.

The Court of Appeal's opinion subordinates the federal interest in enforcing the antitrust laws to a public utility's interest in pursuing a purely private, commercial business that has been protected by the Oklahoma Corporation Commission ("the Commission"). Over many years the Commission's protection, in the form of sporadic orders and tacit approvals of tariffs which exceeded its jurisdiction, allowed the Public Service Company of Oklahoma ("PSO") to engage in a host of anticompetitive acts including refusals to deal, territorial exclusions, price manipulation and predatory pricing tactics.

The relevant market is outdoor lighting equipment—poles, lamps, etc.—leased to commercial and industrial customers (primarily for nighttime security purposes) in the City of Tulsa, Oklahoma. From 1969 to 1983, PSO's market share swelled from 24% to nearly 65%, while the plaintiffs' shares declined from nearly 24% to 13%, from 13% to 5%, from 23% to 6% and from 9% to 8% over the same period. *See* Petitioner's Appendix, at E-2. Two competitors went out of business entirely. The Commission's protection of PSO's pricing and other activities created a deteriorating competitive market for a service not offered to the public generally but to only a few commercial and industrial customers.

The starting point for the Tenth Circuit's faulty analysis is its finding that ". . . we believe there exists a clearly articulated state policy to regulate the market for leased outdoor lights." *Lease Lights, Inc. v. Public Serv. Co. of Okla.*, 849 F.2d 1330, 1333 (10th Cir. 1988). This is based upon the word "light", in that portion of Okla-

homa's constitution which confers power upon the Commission to regulate public service corporations (not public utilities) where they are defined as "all gas, electric, heat, *light* and power companies . . ." *Id.* (quoting Okla. Const. Art. IX § 34) (emphasis added by the Court of Appeals). While it may be true that state law does not have to "explicitly authorize the challenged conduct," it must at least indicate a clear intent to supplant regulation for competition there. *Lease Lights, Inc.*, 849 F.2d at 1333. There is simply no adequate support for the Court of Appeals' finding that the State of Oklahoma had clearly preferred regulation over competition in the market for leased outdoor lighting, simply because the Commission is given broad statutory authority to regulate the public business of a public utility.

The Commission allowed PSO to include within its general rate-base its investment in the outdoor lighting program despite the fact that the program served only a small proportion of the public and constituted a separate business venture not used by the ratepayers as a whole. It should have seemed obvious to the Commission that in seeking its approval of submitted tariffs, PSO was enticing the Commission to regulate conduct beyond its jurisdiction.

It was not until October 1984, however, when the obvious was finally spelled out. In the case of *Public Serv. Co. of Okla. v. Oklahoma Corp. Comm'n*, 688 P.2d 1274 (Okla. 1984), the Supreme Court of Oklahoma held that it was improper for the Commission to allow PSO to include the investment in the private business venture of leasing outdoor lighting to commercial customers within the general rate-base because it would force all ratepayers to subsidize a service used by only a few. This was analogous to the selling of appliances by a public utility. In short, the Commission had no justification to regulate this aspect of PSO's business, since it was private and not public.

Implicit in the decision of the Oklahoma Supreme Court is the clear and unmistakable message that the State of Oklahoma does not have, and never did have, any interest in regulation of the leased outdoor lighting market.

Despite the Oklahoma Supreme Court's decision, the Tenth Circuit found that PSO was still required to "comply with the rates mandated by the Commission before 1984." *Lease Lights, Inc.*, 849 F.2d 1330, 1334. As a result, the Court of Appeals held that PSO's reliance on the Commission's actions, whether those actions were lawful or not, was sufficient to confer state-action antitrust immunity upon the utility. The Tenth Circuit ruled that this immunity shielded PSO because the illegality of the "attempted state regulation is not an appropriate basis for disregarding state action immunity." *Id.* The Court of Appeals cited *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985) in support of its holding. The situation presented by the instant case, however, is not analogous to the one confronting the *Llewellyn* court. This is not an instance where the Commission has committed some procedural irregularity in the adoption of a state regulation. The Commission's orders and its tacit approvals of tariffs were not merely "ordinary errors or abuses," and, as a result, PSO could not reasonably have relied upon their obvious illegality. *Id.* at 774 (citations omitted).

The Court of Appeals' reliance upon the *Llewellyn* court's assertion that "even the constitutional invalidity of the attempted state regulation is not an appropriate basis for disregarding the immunity conferred by *Parker* [*v. Brown*, 317 U.S. 341 (1943)]," is misplaced. 765 F.2d at 774. In *Llewellyn*, as in the instant case, the respective courts of appeals mistakenly extended *Parker* immunity by allowing private, regulated entities to retain immunity in the face of illegal state regulation.

In *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the cases relied

upon by the *Llewellyn* court, the issue was whether or not state-action immunity should be afforded to governmental authorities, not private, regulated business concerns. *Preferred Communications* and *Bates* extended immunity to the sovereign acts of state governments, their political subdivisions, or their regulatory agencies. *See Preferred Communications*, 754 F.2d at 1415 (extending immunity to the actions of the City of Los Angeles); and *Bates*, 350 U.S. at 361 ("Here appellants' claims are against the State.").

Moreover, the Tenth Circuit found "there should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized." *Lease Lights, Inc.*, 849 F.2d at 1334 (citing P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 212.4b, at 132 (Supp. 1987) (hereinafter "Areeda & Hovenkamp"). However, where PSO, a private business entity operating as a public utility, relies upon an action of a state agency, state-action immunity remains intact only where the agency action reasonably appears "to be lawful both in relation to the antitrust laws . . . and in relation to the scope of the agency's authority under state law." Areeda & Hovenkamp, ¶ 212.4b, at 132-33.

Even assuming the viability of a "reliance upon state action" defense for private entities, PSO's reliance upon the actions of the Commission was unreasonable. Clearly the regulation of leased outdoor lighting by the Commission, where that regulation extended only to those entities also engaged in the provision of electric power, does not reasonably appear to be a lawful method of regulation either under the antitrust laws or in relation to the scope of authority delegated to the Commission under state law.

It is well settled that when a state decides to regulate an area of economic activity, its intention must be to supplant competition with regulation in order to preclude the application of the federal antitrust laws. *See Cantor*

v. Detroit Edison Co., 428 U.S. 579, 595-96 (1976). The Commission, however, did not move to regulate the entire leased outdoor lighting market; rather it only extended its ordinary regulation of utilities to their non-public business activities. If public utilities, such as PSO, are permitted to avail themselves of state-action antitrust immunity merely by seeking state agency ratification of their non-public business activities, the antitrust laws will be eviscerated.

CONCLUSION

The Tenth Circuit has extended the reach of state-action antitrust immunity under *Parker* and its progeny by allowing a private, regulated entity to immunize itself by seeking ratification of its monopolistic behavior. If the Tenth Circuit's holding is permitted to stand, all private business undertakings of otherwise state-regulated public utilities will receive antitrust immunity regardless of the manner in which they are conducted, so long as a state agency has taken some action related to those practices. Immunity will attach even where the state agency has exceeded its authority under state law.

For the reasons expressed herein, this Court should grant the Petition for Writ of Certiorari, reverse the decision of the Court of Appeals and reinstate the judgment of the district court.

Respectfully submitted,

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